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In The

Supreme Court of the United States

October Term, 1980

POLK COUNTY; POLK COUNTY BOARD OF SUPERVISORS; POLK COUNTY OFFENDER ADVOCATE; and MARTHA SHEPARD, Individually and through her official capacity as an Agent or Assistant for Polk County,

Petitioners,

VS.

RUSSELL RICHARD DODSON,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether a county-employed public defender acts under color of state law in representing indigent defendants so as to be subject to suit under 42 U.S.C. §1983.

2. Whether a county-employed public defender appointed to represent indigent defendants enjoys an absolute immunity, rather than a qualified immunity, from suits brought under 42 U.S.C. §1983 for actions taken while representing such indigent clients.

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RUSSELL RICHARD DODSON,

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The Order of the United States District Court for the Southern District of Iowa, Central Division, of November 5, 1979 (Civil No. 79-507-B) dismissing Mr. Dodson's action is reported at 483 F.Supp. 347, and is found in Appendix "B" to the Petition for Writ of Certiorari.

The opinion of the United States Court of Appeals for the Eighth Circuit

affirming in part and reversing in part the District Court's judgment was filed on August 26, 1980, is reported at 628 F.2d 1104, and is found in Appendix "A" to the Petition for Writ of Certiorari.

JURISDICTION

This action was filed in the United States District Court for the Southern District of Iowa, Central Division, on November 5, 1979, asserting claims under 42 U.S.C. §1983 and implicitly invoking federal jurisdiction under 28 U.S.C. §1343. (Joint App., pp. 4-23). The District Court dismissed the action the same day, and Mr. Dodson filed a timely Notice of Appeal with the Eighth Circuit Court of Appeals on November 23, 1979. (Joint App., p. 47). The Court of Appeals entered its judgment affirming in part and reversing in part the District Court's opinion on August 26, 1980. (Petition for Cert., App. A). Polk County and its agents filed their Petition with this

Court for a Writ of Certiorari on November 21, 1980, alleging grounds specified in Supreme Court Rule 17.1, including a conflict among decisions of various circuits of the Courts of Appeals. This Court granted certiorari on March 2, 1981 (Joint App., p. 49), exercising its jurisdiction under 28 U.S.C. §1343(3).

STATUTE INVOLVED

The statute in question is 42 United States Code Section 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage of any state or territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdicition thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF CASE

Chapter 336A of the Code of Iowa (1981) (App. A to Brief) gives to Iowa

counties the option of creating a public defender's office for the purpose of representing in criminal actions any defendant who is determined to be without adequate funds to employ an attorney. The public defender is appointed by the provision that the office be filled by the county board of supervisors upon recommendation by the district court judges of the judicial district containing the county the defender is to serve. In Polk County, the attorney's salary and the operating expenses of the Polk County Offender Advocate's Office are paid out of the County's general funds, and the County also furnishes office space and furniture for the program. The Polk County Offender Advocate Office employs nine lawyers, seven of whom represent only criminal defendants, and two who represent juveniles. The office's case load is approximately 2,500 cases per year, split evenly among the above-mentioned

seven defenders. The assistant public defenders are appointed by the public defender in the manner prescribed by the County Board of Supervisors, and their compensation is determined by the Board of Supervisors.

On February 1, 1979, the Respondent herein, Russell Richard Dodson, was convicted in Polk County District Court of First Degree Robbery and was subsequently sentenced to a term of 25 years in prison. On the same day, Martha Shepard of the Polk County Offender Advocate's Office, two of the Petitioners in this action, was appointed to represent Mr. Dodson in the appeal of his conviction to the Iowa Supreme Court. After scrutinizing Mr. Dodson's claim, Mrs. Shepard decided that there were no grounds to warrant reversal of his conviction, and moved for permission to withdraw as counsel and to have the appeal dismissed as frivolous. Iowa Rule of Appellate Procedure 104 provides for

the dismissal of appeals found by the Iowa Supreme Court to be "wholly frivolous". The Motion to Withdraw was subsequently granted by the Iowa Supreme Court, and the appeal was dismissed.

Thereafter, on November 5, 1979, Mr. Dodson filed a pro se complaint in the United States District Court for the Southern District of Iowa, alleging that Mrs. Shepard failed to adequately represent him in his appeal to the Iowa Supreme Court of his robbery conviction. The lawsuit claimed that Mrs. Shepard's actions had deprived Dodson of his right to counsel, inflicted on him cruel and unusual punishment, and arbitrarily denied him his state-created right to appeal in violation of the Due Process Clause of the Fourteenth Amendment. In addition, Mr. Dodson asserted claims for malpractice and breach of oral contract to prosecute the appeal.

The above-described action was brought under 42 U.S.C. §1983, and federal jurisdiction was invoked pursuant to 28 U.S.C. §1343(3). In addition to Mrs. Shepard, the Complaint named the Polk County Offender Advocate and the Polk County Board of Supervisors as defendants, alleging that they were responsible for Mrs. Shepard's actions since they had established rules and procedures for her to follow in handling criminal appeals. Mr. Dodson further alleged by implication that the above-named parties were engaged in a conspiracy to deny him and other individuals similarly situated their rights to due process of law, the effective assistance of counsel, and equal protection under the law. The Complaint sought injunctive relief, monetary damages, and relief from confinement.

On November 5, 1979, the District

Court[1] dismissed the claims against Mrs. Shepard and the Polk County Offender Advocate for lack of "state action", a prerequisite to an action under 42 U.S.C. §1983. (Petition for Certiorari, App. "B", p. 11). The claims against the Polk County Board of Supervisors were also dismissed because, in the District Court's opinion, the complaint failed to allege the requisite personal involvement with unconstitutional conduct. (Petition for Certiorari, App. "B", p. 11). After disposing of all the constitutional claims, the District Court then dismissed the pendent state claims as well. (Petition for Certiorari, App. "B", p. 12). Mr. Dodson then filed a Motion to Reconsider, or in the Alternative, a Motion for Leave to take an Interlocutory Appeal. (Joint App., p. 24). The District Court over-

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[1] The United States District Court for the Southern District of Iowa, the Honorable Harold D. Vietor presiding.

ruled the Motion to Reconsider, and ordered that Dodson could proceed in forma pauperis to appeal the Court's Order of dismissal. (Joint App., p. 44).

On appeal to the United States Court of Appeals for the Eighth Circuit, Mr. John D. Hudson was appointed to represent Dodson and to address the sole issue of whether or not a public defender is subject to suit under 42 U.S.C. §1983. (Joint App., p. 48). Briefs were filed, oral argument was presented, and on August 26, 1980, the Eighth Circuit, after recognizing the considerable split in authority among the federal courts entertaining this issue, reversed the decision of the District Court and ruled that a county-employed public defender does act under color of state law in representing indigent defendants and enjoys only a qualified

immunity from liability.[2] (Petition for Certiorari, App. "A", p. 2).

On November 21, 1980, Polk County and its agents filed their Petition with this Court for a Writ of Certiorari alleging a conflict among the decisions of the various circuits of the courts of appeals. On March 2, 1981, the Petition was granted and on March 23, 1981, John D. Hudson was again appointed to represent Mr. Dodson in the proceedings before the Supreme Court. (Joint App., p. 52).

SUMMARY OF ARGUMENT

Beginning with Gideon v. Wainwright, 372 U.S. 335 (1963), a line of constitutional cases has assured counsel to

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[2] Judge Overton of the U.S. District Court for the Eastern District of Arkansas, sitting by designation, dissented from the opinion of the other two members of the Eighth Circuit panel. (Pet. for Cert., App. A, pp. 20-29). Judge Overton argued that: (i) all but one circuit considering the question have concluded that public defenders do not act under color of state law; and (ii) public defenders must enjoy the same immunity from suit as that of the prosecutor announced in Imbler v. Pachtman, 424 U.S. 409 (1975).

virtually all indigent criminal defendants. Various schemes for meeting these mandates have been utilized. The most common methods are assigned counsel from the private bar, legal assistance from organizations financed by a combination of public and private funds, and part-time or full-time public defenders. With the advent of such systems, the quality of criminal defense has improved to the point where some contend that an indigent defendant gets better representation than one who can afford a lawyer. Nakles, Criminal Defense Lawyer: The Case for Absolute Immunity from Civil Liability, 81 Dickinson L.Rev. 229. Nonetheless, more and more indigent defendants are suing their defense lawyers for money damages to compensate for alleged mistakes made in the course of a criminal defense. The overwhelming majority of such actions have been instituted in federal court

under the Civil Rights Act of 1871, 42 U.S.C. §1983.

Nonetheless, to date no §1983 suit against a public defender alleging a violation of the constitutional right to counsel has progressed beyond the pleading stage. The courts have universally refused to reach the merits for one of two reasons. Some courts have been adamant that there is no cause of action because, contrary to the requirements of §1983, the public defender's conduct does not constitute state action. Espinoza v. Rogers, 470 F.2d 1174 (10th Cir. 1972). As an additional rationale, some courts have held that even if public defenders act under color of state law for the purposes of §1983 jurisdiction, public policy dictates that they be absolutely immune from §1983 suits. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). The Supreme Court has not yet authoritatively spoken on either issue.

I

The reason most frequently cited in support of dismissal of §1983 actions against public defenders is that they do not act under color of state law, a jurisdictional prerequisite to such actions. The Eighth Circuit Court of Appeals below erroneously believed that the fact that all of Polk County's public defenders are selected, paid, hired, and fired by the county was sufficient to find them "state actors" for the purposes of §1983. The Eighth Circuit's ruling should be reversed for the following reasons:

The public defender does not act under color of state law because he has an overriding duty to protect his client's interest and, hence, is not controlled by the state. This view rests on the premise that the public defender's role is analagous to that of the private criminal defense attorney, who is not a state

actor for §1983 purposes. The fact that an attorney is a public defender appointed by the court is not in itself sufficient to bring the defender's actions within the purview of state action, because neither the court nor the state has any significant control over the attorney-client relationship. United States ex rel. Simmons v. Zibilich, 542 F.2d 259 (5th Cir. 1976). Indeed, American Bar Association standards underscore the fact that appointed counsel must be as free from judicial and political interference as privately retained counsel. American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Defense Function (1971), at §3.9. Some courts have likened the public defender's status to that of an independent contractor, stating that the attorney-client relationship is of a nature that precludes outside interference by the government. Spring v. Constantino,

168 Conn. 563, 362 A.2d 871 (1975). The function of a public defender, once assigned to a case, is the same as that of a privately retained defense counsel; he has exactly the same duties, burdens, and responsibilities as the highly paid, retained in advance criminal defense lawyer. Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 1, at 6 (1969).

Public defenders appointed pursuant to state statute or local authorization do not, simply by virtue of governmental compensation, become officers of the state. The mere fact that there is state funding and state involvement in a program does not automatically expose the program's actors to §1983 liability. It is the nature of the office, the powers wielded, and the responsibilities carried out that are the key considerations. Furthermore, payment by the state does

not endow the public defender with any powers not already possessed by virtue of being licensed to practice law in the state. United States ex rel. Wood v. Blacker, 335 F.Supp. 43 (D.N.J. 1971). Except for the fact that public defenders are compensated by the government, nothing about their activity, or the effect thereof, is in any way dependent upon, or enhanced by, any state power or authority vested in them.

Moreover, this Court's recent decision in Ferri v. Ackerman, 444 U.S. 193 (1979), supports the conclusion that public defenders do not act under color of state law. In that case, this court ruled that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by a former client. The outstanding mandate of the

decision is the court's position that appointed defense counselors are as private and independent of governmental control as retained lawyers, and should be subject to exactly the same liabilities as retained counsel. Following this position, a logical extension of Ferri is that since privately retained lawyers are not liable under §1983 because they do not act under color of state law, public defenders should also be free from liability under the Civil Rights Act since they are not "state actors". Since the burdens and responsibilities of retained counsel and court-appointed defenders are identical in all respects, both should be found not to act under color of state law for the purposes of §1983 litigation.

II

A second reason for dismissing §1983 claims against public defenders is that they are as immune in criminal cases as

judicial officers are from civil liability. The Eighth Circuit compounded its erroneous decision on the color of state law issue by ruling that public defenders are entitled to only a qualified immunity from §1983 litigation. The lower court evidently believed that the grant of such a qualified immunity was an adequate compromise between the interests of public defender offices on the one hand, and the public interest in providing relief to indigent defendants whose constitutional rights have been violated. For the reasons discussed hereafter, the Eighth Circuit's ruling granting only a qualified immunity to public defenders must be reversed, and this court should find that public defenders are absolutely immune from actions brought under 42 U.S.C. §1983.

Initially, it should be noted that a historical study of the immunity doctrine at common law compels a conclusion that

all government subsidized defense counsel are absolutely immune from liability under §1983. In both the United States and England, the law of defamation has long protected both prosecutors and defense lawyers from suit for any statements made in the courtroom or in briefs and pleadings so as to prevent litigants from weighing all decisions in terms of potential liability. Indeed, in England barristers have been granted absolute immunity from suit in order to encourage them to litigate fearlessly and independently, to accept any client seeking their services, and to avoid retrying of issues. Rondel v. Worsley, 1 A.C. 191 (1969). Implicit in such a policy is the understanding that in certain occasions it is indispensable to the public interest that persons speak fearlessly and independently, uninfluenced by the fear of being brought to account in a civil damages action. This doctrine of absolute immun-

ity has been applied to virtually all other participants who fulfill an important function in the judicial process, including prosecutors, judges, grand jurors, court clerks, and court reporters.

In addition, various considerations of public policy dictate a finding that public defenders must be absolutely immune from §1983 liability. The very function of such counsel, like that of judges and prosecutors, often invites a common law tort action. Imbler v. Pachtman, 424 U.S. 409 (1976). Indeed, the practical realities surrounding the function of public defenders are wholly dissimilar, for purposes of immunity, from the circumstances of privately retained counsel. Because of such factors as their inability to choose or discharge their counsel, indigent defendants often view government-sponsored defense counsel with suspicion, and tend to perceive them

as representatives of the state. In addition, privately retained lawyers operate without certain financial and other pressures faced by public defenders and possess important economic and other influence with clients that their publicly supported courterparts lack. Thus, regardless of the quality of legal services rendered by such public defenders, the often inevitable result is bitterness towards the government-sponsored attorney and frequent civil suits and petitions for habeas corpus and other collateral relief. Just as the role of the prosecutor and the judge is likely to produce "with some frequency retaliatory suits by angry defendants," Butz v. Economou, 438 U.S. 478 (1978), so would the abrogation of the immunity doctrine in fact lead to tremendous pressures on court-appointed public defenders.

The interests of indigent criminal defendants are served better by a contin-

ued application of the doctrine of absolute immunity than by obtaining the highly speculative benefits of a §1983 remedy. Abrogation of the absolute immunity doctrine would harm defendants by inhibiting the exercise of the public defender's independent judgment as to such matters in the conduct of litigation as the making of pre- and post-trial motions, and the examination and cross-examination of witnesses. Indeed, some courts have justified a grant of absolute immunity to defenders so that they may vigorously assert the interests of their clients without their efforts being chilled by fear of lawsuits. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972). Moreover, without a grant of absolute immunity, the energies of public defenders would be diverted from their public function of representing their clients by the need to defend and guard against §1983 actions. Miller v. Barilla, 549 F.2d 648 (9th Cir. 1977).

Additionally, as a practical matter, abrogation of the doctrine of absolute immunity would make post-trial review of convictions less effective in many cases, since the fear of §1983 liability would be likely to dissuade public defenders from acknowledging after trial their own mistakes or the errors of other attorneys on those occasions where necessary to support defendants' appeals or petitions for review. Most certainly, there would be a conflict between the public defender's duty to fully represent his client's interest by revealing flaws in his case, and his interest in protecting himself from civil liability.

Other interests of the public and the criminal justice system also call for a grant of absolute immunity to public defenders. It is increasingly difficult today to encourage able attorneys to accept positions with public defender offices, which offer far lower compensa-

tion than is available to privately retained defense counsel. The imposition of §1983 liability on such defenders would add further burdens and costs on attorneys seeking to perform a public service by representing indigents, and would deter many qualified lawyers from accepting such positions. Minns v. Paul, 542 F.2d 899 (4th Cir. 1976). Such a reluctance on the part of attorneys to serve as public defenders could have the very serious effect of jeopardizing the indigent defendants' Sixth Amendment right to effective assistance of counsel. John v. Hurt, 489 F.2d 786 (7th Cir. 1973). Moreover, abrogating the doctrine of absolute immunity would harm the public by making it impossible for defenders to exercise their best professional judgment in an effort to utilize efficiently the limited resources of the criminal justice system and to fulfill their ethical obligations. As with respect to prosecutors,

the abrogation of absolute immunity would create the threat that the publicly supported defense attorney "would shade his decisions instead of exercising the independence of judgment required by his public trust". Imbler v. Pachtman, 424 U.S. 409 (1976).

Absent §1983 liability for public defenders, complete and sufficient remedies exist today through collateral review procedures, as well as judicial and professional discipline and supervision, to insure that indigent defendants receive their right to effective assistance of counsel. Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978). In fact, the abrogation of absolute immunity would significantly interfere with these remedies, and would substitute in their place an alternative, §1983 liability, which is of questionable effectiveness. Indeed, the allowance of a §1983 suit against such defenders would involve a form of

collateral attack on a criminal judgment, and would create great uncertainties and complications in the criminal justice system.

The policy considerations which result in absolute immunity for judges and prosecutors are equally applicable to public defenders. Since the judge, the prosecutor, and the public defender are considered a tripartite entity operating for the efficient administration of justice, it is crucial that each have the independence of judgment necessary to serve the public interest. As the Supreme Court itself has pointed out, "attaining the system's goal of determining guilt or innocence requires that both the prosecutor and the defense have wide discretion in the conduct of the trial and the presentation of evidence." Imbler v. Pachtman, 424 U.S. 409 (1976). Obviously, the very reasons advanced to assert that the public defender acts under color of

state law because of the favorable comparison of his activities with those of the prosecutor, also support an argument in favor of the public defender on the issue of absolute immunity. Brown v. Joseph, 463 F.2d 1046 (3rd Cir. 1972).

As seen, an analysis of the common law, public policy, and the great weight of federal case law demonstrates that the Eighth Circuit's decision granting public defenders only a qualified immunity is incorrect and must be reversed. This Court should reaffirm that absolute immunity is appropriate "to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz v. Economou, 438 U.S. 478 (1978). Public defenders must be given absolute immunity from civil liability for damages under 42 U.S.C. §1983.

The matter at hand, then, presents a paradoxical either-or situation. If, on the one hand, the Court is of the opinion that the public defender's office is essentially the same as that of privately retained defense counsel, it should find that the defender does not act under color of state law for the purposes of 42 U.S.C. §1983. On the other hand, if the Court feels that the status of the public defender is not akin to that of retained counsel, but is rather like that of state officials such as judges and prosecutors, it should grant the defender absolute immunity under §1983 for the same reasons that those officials have been allowed immunity. These two arguments are certainly inconsistent with each other. Yet, it is imperative that the Court accept one of them; to hold that the public defender is subject to suit under §1983, while absolving from such liability all other participants in the

judicial process, including judges, prosecutors, court-appointed counsel, and privately retained attorneys, would be to invite dissatisfied clients to initiate a multiplicity of suits based upon fancied wrongs. The resultant harm would fall on society and the defendant himself.

ARGUMENT

I

THE FERRI OPINION, THE GEAT WEIGHT OF FEDERAL CASE LAW, AND THE FACT THAT THEIR RESPONSIBILITIES PARALLEL THOSE OF PRIVATELY RETAINED DEFENSE COUNSEL SUPPORT A DECISION THAT PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW FOR THE PURPOSES OF 42 U.S.C. §1983.

To bring suit under 42 U.S.C. §1983, a plaintiff must establish two things: That he has been deprived of a right protected by the constitution, and that the deprivation occurred "under color of state law". Federal courts uniformly have held that public defenders and attorneys appointed by the court to represent indigent defendants do not act under color of state law, even though the state may pro-

vide their compensation. The Eighth Circuit Court of Appeals held below that the fact that the defenders in the Polk County Offender Advocate's program were selected, paid, hired, and fired by the County was sufficient state involvement to constitute "color of state law" on the part of such defenders. However, an analysis of the Supreme Court's opinion in Ferri v. Ackerman, the great weight of federal case law, and the fact that public defenders owe their loyalty solely to their client and are allowed to act independently of governmental control demonstrates that the Eighth Circuit's decision is incorrect and must be reversed. Public defenders should be found not to act under color of state law for the purpose of an action under 42 U.S.C. §1983.

A. GOVERNMENT-SPONSORED PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW IN REPRESENTING INDIGENT DEFENDANTS SINCE THEIR RESPONSIBILITIES PARALLEL THOSE OF PRIVATELY RETAINED DEFENSE COUNSEL: THEY ACT INDEPENDENTLY OF GOVERNMENTAL CONTROL IN REPRESENTING

INDIGENT CLIENTS, OWE THEIR LOYALTY SOLELY TO THE CLIENT, AND ARE FREE TO PERFORM THEIR FUNCTIONS IN ESSENTIALLY THE SAME MANNER AS IF PRIVATELY RETAINED.

It cannot be disputed that, in Iowa, the public defender is a county employee who is specifically authorized by statute to defend persons charged with public offenses who are financially unable to employ counsel. To be sure, there are connections between the public defender and the government. The court selects him to represent a particular individual, while the county pays his salary and furnishes him with office space, furniture and supplies. But, these ties with governmental bodies are simply not enough to find the public defender "acting under color of state law."

Indeed, one court has pointed out that, far from constituting action of the government, the appointed defense counsel is obligated to "oppose the efforts of

the state". Vance v. Robinson, 292 F. Supp. 786, 788 (W.D. N.C. 1968). An attorney's allegiance is to his client, not to the person who happens to be paying him for his services.[3] Moreover, the function of public defenders, once assigned to a case, is the same as that of privately retained defense counsel; whether he is a court-appointed attorney or a public defender, he is to represent the indigent suspect with the same professional competence as if he had been retained by a fee-paying client.[4] As Chief Justice Burger noted several years ago:

> ". . . the defense counsel who is appointed by the court or is part of a legal aid organiza-

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[3] Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975).

[4] "Whether an indigent is represented by an individual or by an institution, he is entitled to the same level of competency as that generally afforded at the bar to fee-paying clients." Moore v. United States, 432 F.2d 730, 736 (3rd Cir. 1970).

> tion, has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer."
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> Burger, Counsel for the Prosecution and Defense - Their Roles Under the Minimum Standards, 8 American Criminal Law Quarterly 1, at 6 (1969).

Integral, then, to the conclusion that the public defender does not act under state law is the belief that he has an affirmative duty to independently protect his client's interests and hence is not controlled by the state. The common theme of the decisions supporting this view is that compensation by the government does not result in government control of the public defender, and that appointed counsel are as much "private" as their retained counterpart.[5] Indeed, the only act of the public defender with respect to the representation of a criminal defendant which involves the exercise of state

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[5] Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978).

power is his decision to represent or to refuse to represent an accused. Thereafter, once he is appointed or assumes the defense of the accused, the public defender in all matters of pre-trial, trial, sentencing and appellate procedure exercises no authority other than that of the attorney for the accused. As stated by the California Supreme Court:

> "Under this statute when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before this court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents."
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> In Re Hough, 24 Cal.2d 522, 528-9 (1944).

Similarly, the Tenth Circuit Court of Appeals has taken the view that since the statutes creating a means of funding public defender offices do not attempt to control or influence the professional judgment of the defenders, it cannot be said that the actions of the defender constitute state action:

> "The Colorado office of State Public Defender derives its existence from Colorado statutes . . . Those statutes in no way attempt to control or otherwise influence the professional judgment of a lawyer employed as a public defender. Additionally, a Colorado public defender's professional duties and responsibilities toward his clients are identical in all respects to any other Colorado attorney whether privately retained or court-appointed.
>
> Therefore, we hold that an attorney does not act under color of state law simply because he has accepted employment as a Colorado public defender."
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> Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972); see also Brown v. Joseph, 463 F.2d 1046, 1048 (3rd Cir.

1972); United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.N.J. 1971).

Other courts have reasoned that the relationship between the county and the public defender is similar to that between an independent contractor and the party contracting for his services.[6] The county has no control over the manner of representation given indigents by the defender, and the nature of the work involves the attorney-client relationship and is of a type that precludes outside interference or direction by the county. The public defender's professional relationship with his client takes on all the obligations and protections attendant upon a private attorney-client relationship except one: the public pays his salary. As stated in 1975 by the Supreme Court of

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[6] Spring v. Constantino, 168 Conn. 563, 362 A.2d 871 (1975).

Connecticut:

> ". . . it is clear as a matter of law that the status of a public defender, once the attorney-client privilege attaches, is that of an independent contractor, rather than that of an employee . . .
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> The Connecticut public defender system derives its support from our statutes, but these in no way attempt to control or otherwise influence the professional judgment of a lawyer who acts as a public defender. Once assigned, the public defender is free to act in behalf of his client, as if he had been employed and retained by the defendant whom he represents. The source of his compensation may be different, but otherwise the relation of an attorney and client is the same."
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> Spring v. Constantino, 168 Conn. 563, 362 A.2d 871, at 877-8 (1975).

Public defender offices, then, were created in order "to place indigent defendants as nearly as may be on a level of equality with non-indigent defendants in the defense of criminal cases." United States v. Tate, 419 F.2d 131, 132

(6th Cir. 1969). The parity between public defenders and retained counsel was envisioned by the founders of defender offices and has been recognized by all who have scrutinized their relationship. The Standards Relating to Providing Defense Services approved by the American Bar Association House of Delegates in February, 1968, set forth the basic principle that defenders and assigned counsel "should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice."[7] As the commentary thereto points out, "[a] system which does not guarantee the integrity of the professional relationship is

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[7] American Bar Association Project of Standards for Criminal Justice, Standards Relating to Defense Services (1968), §1.4 at p. 6.

fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can retain."[8] It is this freedom of action that state and local legsilatures undoubtedly had in mind when they first created public defender offices. Such offices establish a system of appointed counsel who are independent of government control, owe their loyalty solely to the client, and are free to perform their functions in as nearly as possible the same manner as if privately retained.

In conclusion, once a public defender accepts the representation of an accused, his public or state function ceases, and thereafter he functions purely as the lawyer of the accused, exercising the rights and powers of the accused. His one interest is the repre-

[8]American Bar Association Project of Standards for Criminal Justice, Standards Relating to Defense Services (1968), §1.4 at p. 19.

sentation of the legitimate interests of his clients; his professional relationship with his client is identical to that of a private attorney, except with respect to payment. His standard of competency within Sixth Amendment standards must comport with that of private defense counsel. United States v. Moore, 432 F.2d 730 (3rd Cir. 1970). Moreover, he acts not as a representative of the state, but as a representative of his client. In short, the status of a public defender is no different, for these purposes, than that of retained counsel. The mere fact that the latter is paid by the individual with means and the former by the government on behalf of the individual without such means is an inadeqaute basis for concluding that public defenders act under color of state law in representing indigent defendants.

B. THE FACT THAT THERE IS STATE FUNDING AND STATE INVOLVEMENT IN THE POLK COUNTY OFFENDER ADVOCATE PROGRAM DOES NOT COMPEL A FINDING THAT THE

ATTORNEYS EMPLOYED IN THE OFFICE ACT UNDER COLOR OF STATE LAW; PAYMENT BY THE STATE DOES NOT ENDOW PUBLIC DEFENDERS WITH ANY POWERS NOT ALREADY POSSESSED BY THEIR VIRTUE OF BEING LICENSED TO PRACTICE LAW.

The great majority of federal courts that have been faced with the question have refused to hold that mere governmental compensation to attorneys for the representation of indigents in criminal prosecutions invests that individual with color of law or badge of office.[9] This viewpoint has maintained widespread support, even where the state not only provides the public defender with compensation but also structures the organization through which he volunteers and operates.[10] Such a finding conforms with the vision of the individuals who founded the first public defender offices - to

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[9] Vance v. Robinson, 292 F.Supp. 786, 788 (W.D. N.C. 1968).

[10] Peake v. County of Philadelphia, 280 F.Supp. 853 (E.D. Pa. 1968).

compensate rather than make a governmental function out of the representation of indigents.

It is important to note that the case of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), did not stand for the general proposition that whenever there is state funding and state involvement in a program, the actors of the program are automatically exposed to §1983 liability. Justice Clark's opinion drew narrow boundaries:

> ". . . Specifically defining the limits of our inquiry, what we hold today is that when a state leases public property in the manner and for the purpose shown to have been the case here, the proscription of the Fourteenth Amendment [referring to prohibitions on racial discrimination] must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself . . ."
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> Burton, supra, at 720.

Indeed, in Burton, supra, the state's extensive participation in the

operation of a private parking facility provided the comprehensive involvement necessary for a finding of state action.

Moreover, although individuals may occupy positions which are publicly-funded and authorized by statute, as do public defenders, this does not compel a conclusion that they are state officers. Instead, it is the nature of the office, the powers wielded, and the responsibilities carried out that are the key considerations. Furthermore, payment by the state does not endow the public defender with any powers not already possessed by virtue of being licensed to practice law in the state.[11] Indeed, should he desire to do so without compensation, he could represent the indigent defendant absent any appointment at all.[12] As stated by

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[11] United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.N.J. 1971).

[12] Mallen, The Court-Appointed Lawyer and Legal Malpractice - Liability or Immunity, 14 American Criminal L.Q. 59, 62 (1976).

a federal court which held that state election officials certifying the election of a U.S. Senator pursuant to federal requirements were not acting under color of state law:

> "It is not defendants' status as state officials that is determinative, it is the nature of the acts performed by them."
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> Philips v. Rockefeller, 321 F.Supp. 516, 521 (S.D. N.Y. 1970), affirmed on other grounds 435 F.2d 976.

Similarly, a public employee does not act under color of state law unless the act in question utilized or depended upon state power or authority:

> "Except for the fact that she was a city employee nothing about Shepherd's activity, or the effect thereof, was in any way dependent upon, or enhanced by, any state power or authority vested in her."
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> Place v. Shepherd, 446 F.2d 1239, 1244-45 (6th Cir. 1971) (holding that acts were not "under color of" state law).

If a public defender makes an objection in the cause of a trial, the objection is not an exercise of state power,

nor is it in any way dependent upon or enhanced by state power. It instead is an exercise of the power of the accused under the Sixth and Fourteenth Amendments and the Iowa Constitution. Similarly, whether a public defender recommends a plea of guilty or not guilty, he is acting as counsel for the accused and not as an officer of the state in the exercise of state power.

In holding that a New Jersey public defender did not act under color of state law despite authorization and funding through a state statute, the United States District Court for New Jersey stated:

> "The New Jersey State Public Defender Act did not clothe the instant defendants with a 'power' that they did not already possess. These defendants were empowered to represent plaintiffs by virtue of their being licensed to practice law pursuant to R. R. 1:21-1 et seq. Moreover, though remunerated by the State of New Jersey, these public defenders were neither servants nor representatives of the state,

> nor were they controlled by the state."
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> United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.N.J. 1971).

Thus, it is not the employment status of the person, but the nature or source of the power exercised in the alleged violation that determines whether the person acted under color of state law. And a public defender in his representation of a client does not exercise state power or authority, but rather exercises as a lawyer the rights and powers of a criminal defendant. Very simply, his actions as a defense attorney are neither enhanced by nor dependent upon state power or his position as a public defender. Consequently, it follows that he does not act under color of state law in the representation of a criminal defendant.

C. THE GREAT WEIGHT OF CASE LAW SUPPORTS THE VIEW THAT PUBLIC DEFENDERS DO NOT ACT UNDER COLOR OF STATE LAW IN REPRESENTING INDIGENT DEFENDANTS.

The majority of federal courts that have considered claims against public defenders under 42 U.S.C. §1983 have concluded that such defenders do not act under color of state law so as to give federal courts jurisdiction over such matters.[13] Furthermore, in every United States Circuit but one, a federal court has declined jurisdiction in a suit brought under the Civil Rights Act on the ground that a court-appointed lawyer does not

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[13] Espinoza v. Rogers, 470 F.2d 1174, 1175 (10th Cir. 1972); United States ex rel. Wood v. Blacker, 335 F.Supp. 43, 47 (D.C. N.J. 1971); Peake v. County of Philadelphia, 280 F.Supp. 853 (E.D. Pa. 1968); Skipper v. Brummer, 598 F.2d 1256, 1265 (5th Cir. 1978); See also Brown v. Joseph, 463 F.2d 1046, 1047-9 (3rd Cir. 1972) (while not deciding issue, court states that they find it "difficult to perceive color of law" in the activities of public defenders); Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977) (court notes in dicta that state action claim, as applied to a public defender, is "tenuous".)

act under color of state law.[14] The view rests on the general premise that the public defenders or court-appointed attorney's role is analagous to that of the private criminal defense lawyer.

Plaintiffs in these actions have asserted a variety of grounds for a finding of state action. It is most frequently urged that the public defender acts under color of state law since he is paid by the state, and that he acts "as an officer of the court".[15] Rejecting the claim that remuneration by the state is

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[14] First Circuit: Page v. Sharpe, 478 F.2d 567 (1st Cir. 1973); Second Circuit: U.S. ex rel. McClaughlin v. New York, 356 F.Supp. 988 (E.D. N.Y. 1973); Third Circuit: Thomas v. Howard, 455 F.2d 228 (3rd Cir. 1972); Fourth Circuit: Shelton v. Randolph, 373 F.Supp. 448 (W.D. Va. 1974); Fifth Circuit: Nelson v. Stratton, 469 F.2d 1155 (5th Cir. 1972); Sixth Circuit: Mulligan v. Schlachter, 389 F.2d 231 (6th Cir. 1968); Seventh Circuit: French v. Corrigan, 432 F.2d 1211 (7th Cir. 1970); Eighth Circuit: Barnes v. Dorsey, 480 F.2d 1047 (8th Cir. 1973); Ninth Circuit: Szijarto v. Legeman, 466 F.2d 864 (9th Cir. 1972).

[15] Johnson v. Kreider, 246 F.Supp. 188 (M.D. Pa. 1967).

in itself sufficient to support a finding that the attorney acted under color of state law, one district court observed that regardless of whether the attorney was paid by the state, "his duty was to oppose the efforts of the state to convict his client. His actions, good or bad, were not done for the state nor under color of any statute, ordinance, regulation, custom or usage." Vance v. Robinson, 292 F.Supp. 786, 788 (W.D. N.C. 1968).

Nor does state action exist simply because a public defender is an officer of the court, as this does not make him an agent of the state.[16] The courts have emphasized that professional responsibilities of government-paid and of private attorneys are identical, in each instance flowing from the same Canons of Ethics.[17]

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[16] Phillips v. Singletary, 350 F.Supp. 297 (D.S.C. 1972).

[17] Vance v. Robinson, 292 F.Supp. 786 (W.D. N.C. 1968).

The Third Circuit succintly set forth the viewpoint of the various federal courts on this issue, when it stated:

> "The public defender argues that once his appointment in a given case is made, his public, or state, function ceases, and that thereafter he functions purely as a private attorney, concerned with and absorbed by one interest - that of serving a private client. His professional relationship with his client takes on all the incidents and considerations attendant upon a private attorney-client relationship except one: the public pays his fee. His standard of competency must comport with that reflecting normal competency of all defense counsel whether privately retained, volunteered, or publicly paid . . . He has but one loyalty - and that is to his client, and not to the state, or to the collective citizenry thereof."
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> "Therefore, he argues, with considerable persuasion, that every aspect of his professional relationship to his client, within the framework of ethical representation thereof, which conceivably could form the subject matter of a claim under §1983, is performed by him not as a representative of the state, under color of state law, but

> in the context of a private practioner. The attorney-client confidential relationship is preserved. His client is not the Common Wealth of Pennsylvania, whose legislative processes created his office; nor the people of Allegheny County, who appointed him to office and pay his salary. His client is a private individual, who, by reason of indigency, is unable to retain and compensate other counsel. Essentially, he is state-paid private counsel, assigned the responsibility of protecting the interest and defending the rights of a client . . ."
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> ". . . the fact that one comes to his court-appointed role as a result of a state-mandated and county-financed system, does not, in any respect whatsoever, distinguish his professional responsibility to his client from that of any attorney appointed to serve without pay, or paid by a legal aid society financed largely by private contributions. We find it difficult to perceive 'color of law' in the activities of the first category, and deny its existence in the latter."
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> Brown v. Joseph, 463 F.2d 1046, 1047-8 (3rd Cir. 1972).

Other federal courts have adopted the rationale that the relationship between

a public defender and an indigent defendant is a "personal relationship of trust and confidence governed by the canons of professional ethics."[18] The "public" nature of the relationship is seen merely as something incidental to the professional relationship of attorney and client. This view is identical to the view adopted by the majority of federal courts in disposing of §1983 actions against court-appointed attorneys:

> "The lack of state action for volunteer court-appointed counsel follows from the nature of the attorney-client relationship underlying disputes such as the instant one. The court-appointed attorney, like any retained counsel, serves his client. He represents his client, not the state. The ancilliary facts that the court has a hand in providing counsel, and that the attorney selection board . . . obtains its authority from statute, do not alter the attorney-client relationship. That

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[18] Sanchez v. Murphy, 385 F.Supp. 1362 (D. Nev. 1974).

> relationship is our concern here. Accordingly, . . . the situation presents no state action."
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> United States ex rel. Simmons v. Zibilich, 542 F.2d 259, 261 (5th Cir. 1976).

Precisely because the nature of the attorney-client relationship remains the same whether the lawyer comes to his position in a privately retained fashion, as a court-appointed counsel, or as the result of his employment in a public defender's office, federal courts have been understandably reluctant to make distinctions that would permit finding no color of state law in the first two instances, as the courts have uniformly held, but would require a finding of state action in the latter. The Supreme Court should follow the rationale of the lower federal courts and rule that, since public defenders are free to act on behalf of their clients in the same manner as if they have been employed and retained by them, they, like

court-appointed and privately retained counsel, do not act under color of state law.

D. THE SUPREME COURT'S RECENT DECISION IN FERRI V. ACKERMAN HOLDS FIRMLY TO THE VIEW THAT APPOINTED ATTORNEYS SHOULD BE SUBJECT TO EXACTLY THE SAME LIABILITIES THAT PRIVATELY RETAINED ATTORNEYS FACE; SINCE PRIVATE LAWYERS ARE NOT LIABLE IN A 1983 ACTION BECAUSE THEY DO NOT ACT UNDER COLOR OF STATE LAW, A LOGICAL EXTENSION OF FERRI COMPELS THE CONCLUSION THAT PUBLIC DEFENDERS ALSO ARE NOT "STATE ACTORS" SO AS TO BE LIABLE UNDER §1983.

The United States Supreme Court in Ferri v. Ackerman, 444 U.S. 193 (1979), reversed the Pennsylvania Supreme Court[19] and held that an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by a former client. In a unanimous opinion, this Court decided that the function of appointed

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[19] Ferri v. Ackerman, 483 Pa. 90, 394 A.2d 553 (1978).

counsel is more closely analagous to that of privately retained counsel, who enjoy no immunity from malpractice prosecution, than to that of judges and prosecutors who have traditionally been accorded immunity at common law.[20] Justice Stevens' opinion refused to consider federally appointed counsel as officers of the federal government acting in the course of their duties, and concluded that lawyers appointed under the Criminal Justice Act[21] to represent indigents do not become officers of the federal government.

In Ferri, supra, the court found no statutory basis for a grant of immunity to federally appointed attorneys. Indeed, the only arguably relevant statute, the Federal Criminal Justice Act, attempted to minimize the difference between private-

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[20] Bradley v. Fisher, 80 U.S. (13 Wall) 335 (1871).

[21] Criminal Justice Act of 1964, 18 U.S.C. §3006 A (1976).

ly retained and court-appointed counsel by compensating appointed attorneys. The court decided that the purpose of the law was that appointed attorneys should be subject to the same liabilities that retained lawyers face.[22]

The court went on to recognize that some federal officers had been granted immunity in the absence of any statute.[23] It reasoned that the duties of federally appointed attorneys, however, were significantly different from the duties of those officials who had been granted immunity at common law, such as judges and prosecutors. Such officials were required to represent the interests of society as a whole, and the immunity granted to them was designed as a protection from disgruntled groups whose desires were not always identical to those of the

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[22] Ferri v. Ackerman, 444 U.S. 193, at 199-200 (1979).

[23] Ferri v. Ackerman, 444 U.S. 193, at 202 (1979).

public. In contrast, the court recognized that an appointed attorney's only duty is to the defendant he is appointed to represent. He has no conflicting responsibility to the public and can avoid malpractice suits by fulfilling his duty to the defendant.

The pivotal question, then, in Ferri, supra, was whether appointed counsel is more analagous to judges and prosecutors, or to retained counsel. This court found it to be the latter:

> ". . . There is, however, a marked difference between the nature of counsel's responsibilities and those of other officers of the court. As public servants, the prosecutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification

for official immunity . . .

In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serve pursuant to statutory authorization and in furtherance of the federal interest in ensuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the government and to oppose it in adversary litigation . . .

. . . Having concluded that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge, or naval captain, we also conclude that the federal officer immunity doctrine . . . is simply inapplicable in this case. Accordingly, without reaching any question concerning the power of congress to create immunity, we hold that federal law does not now provide immunity for court-appointed counsel in a state malpractice suit brought by his former client."

Ferri v. Ackerman, 444 U.S. 193, at 202-4 (1979).

In the Ferri decision, the court drew an important distinction in the meaning of the term "federal officers". After noting that an attorney appointed to represent an indigent defendant in a federal criminal trial is also a federal officer,[24] the opinion goes on to distinguish between the nature of appointed counsel's responsibilities and those of other officers of the court. The court refused to include federally appointed counsel as part of an equilateral triangle with the judge and prosecutor, finding a "marked difference" in the nature of counsel's responsibilities. The court declined to view appointed counsel as a government employee, official, or advocate, holding that such counsel must remain independent of government interests, and, indeed, must zealously oppose the govern-

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[24] Ferri v. Ackerman, 444 U.S. 193, at 202 (1979).

ment in litigation.[25] The Court's opinion, then, drew a parallel not between the prosecutor and defender, but between appointed counsel and privately retained counsel. The court evidently realized that it was through this approach that the vitality of the adversary system could best be transmitted to indigent defendants.

Very possibly, the Supreme Court's decision in Ferri, supra, may detract from the argument that public defenders should enjoy absolute immunity from actions under §1983, an argument raised by the Petitioners in Division II of this Brief. Though its opinion was specifically limited to the immunity of federally appointed attorneys in state malpractice actions, the court in Ferri has nonetheless adopted a conservative stance and a restrained position on the immunity issue. However, the most outstanding mandate of

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[25] Ferri v. Ackerman, 444 U.S. 193, at 204 (1979).

the decision is the strong position of the court that appointed defense counselors are private and independent of any cloak of governmental control. The court appears to reject the view that the judge, prosecutor, and defender are a trinity operating for the public good. Rather, it holds firmly to the position that the role of an appointed defense counsel is that of a private, non-official adversary to the government position, whose loyalty is owed solely to the client.

The important implication of Ferri, then, is that since court-appointed counsel's responsibilities and duties toward a client parallel exactly those of privately retained counsel, they should be subject to exactly the same liabilities as private counsel. Thus, since a privately retained lawyer is subject to malpractice litigation, the court reasoned that appointed counsel should be subject to the same malpractice liability. Follow-

ing this position, a logical extension of Ferri is that since retained counsel are not liable under §1983 because they do not act under color of state law, court-appointed lawyers and public defenders should be free from liability under the Civil Rights Act since they are not "state actors". Since the duties and responsibilities of privately retained counsel and court-appointed defenders are identical in all respects, both should be found not to act under color of state law for the purposes of §1983 litigation.

The purposes of the Federal Criminal Justice Act are essentially the same as the goals of local and state public defender statutes - to provide for and compensate attorneys appointed to represent indigent defendants in criminal trials. The Supreme Court in Ferri, supra, specifically noted that in enacting the Criminal Justice Act, Congress clearly wanted appointed counsel to share as much

of retained counsel's characteristic independence from the government as was possible notwithstanding the government's subsidy.[26] As a result, the court decided that appointed attorneys should be subject to the same malpractice liability that privately retained lawyers must face from unhappy clients. In the same light, state-appointed public defenders share the same independence and unbridled discretion that retained lawyers possess in the representation of criminal defendants. As such, and in view of the mandate of Ferri, they too should be subject to the same liabilities as private counsel. The resulting logic compels a conclusion that since retained attorneys do not act under color of state law for the purposes of §1983, public defenders also are not "state actors" so as to be liable under the Civil

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[26] Ferri v. Ackerman, 444 U.S. 193, at 199 (footnote 16) (1979).

Rights Act. Any other conclusion would simply be irrational in light of the Ferri decision.

II

THE COMMON LAW, THE PUBLIC INTEREST, AND THE AVAILABLE ALTERNATIVES TO §1983 LIABILITY SUPPORT A DECISION THAT PUBLIC DEFENDERS ARE ABSOLUTELY IMMUNE FROM SUIT UNDER 42 U.S.C. §1983.

Public Defenders are generally appointed and compensated by state and municipal governments and perform the critical governmental function of representing indigent defendants in state criminal trials. The Court of Appeals for the Eighth Circuit below held that the grant of a qualified immunity to public defenders is an appropriate compromise between the interests of public defender offices on the one hand, and the fundamental public interest in providing relief to indigent clients under §1983 whose constitutional rights have been violated. However, an analysis of

the common law, public policy, and the available alternatives to §1983 liability demonstrate that the Eighth Circuit's decision granting public defenders only a qualified immunity is incorrect and should be reversed. Public defenders must be given absolute immunity from civil liability for damages under 42 U.S.C. §1983.

A. THE COMMON LAW ABSOLUTE PRIVILEGE FOR COUNSEL IN DEFAMATION SUITS COMPELS A SIMILAR ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS FROM ACTIONS UNDER 42 U.S.C. §1983.

Initially, it should be noted that the American common law has long recognized an absolute immunity in defamation actions for counsel engaged in judicial proceedings. In both the United States and Great Britain, the law of defamation has long protected both prosecutors and defense lawyers from suit for any statements made in the courtroom or in briefs and pleadings so as to prevent litigants from weighing all decisions in terms of

potential liability. Professor Prosser states the rule as follows:

> "As in the case of other acts in his judicial capacity, therefore, the judge is absolutely privileged as to any defamation he may utter, even though he knows it to be false and is motivated by personal ill will towards the plaintiff . . . Likewise the privilege extends to counsel in the conduct of the case . . ."
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> Prosser, Handbook on the Law of Torts, section 114, p. 777-778 (4th Ed. 1971) (footnotes omitted); See also Yaselli v. Goff, 12 F.2d 396, 403 (2nd Cir. 1926).

The House of Lords, in rejecting a suit against a barrister for alleged malpractice in a criminal proceeding, stated:

> "It is all part of the long established general policy that judges, witnesses, and counsel must be immune from actions arising out of their conduct during the course of litigation in the public interest."
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> Rondel v. Worsley, 1 A.C. 191, at 284 (1969).

An excellent summary of the American and English law on the subject of absolute

immunity up to the year 1909 stated the policies behind it as follows:

> "Absolute privilege has been conceded on obvious grounds of public policy to insure freedom of speech where it is essential that freedom of speech should exist. It is essential to the ends of justice that all persons participating in judicial proceedings (to take a typical class for illustration) should enjoy freedom of speech in the discharge of their public duties or in pursuing their rights, without fear of consequences. The purpose of the law is, not to protect malice and malevolence, but to guard persons acting honestly in the discharge of a public function, or in the defense of their rights, from being harassed by actions imputing to them dishonesty and malice. Freedom from vexatious litigation for honest participants is so important that the law will not take the risk of subjecting them to such danger in order that a malicious participant may be mulcted in damages. . . ."
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> Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Columbia Law Reivew, 463, 469 (1909) (footnotes omitted).

The basic idea of privilege in the law of defamation, then, is the same as that in other instances of privilege in the law of tort.[27] It proceeds from a general conviction that although sound policy requires that certain general types of conduct be made the basis for legal liability, there are exceptional circumstances where persons engaging in such conduct should be protected fully. The rule of absolute immunity is founded upon the principle that in certain occasions it is indispensable, or at least advantageous, to the public interest that persons should speak freely and fearlessly, uninfluenced by the possibility of being brought to account in an action for defamation.[28] Since the interest is one of paramount importance, considerations of

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[27] 3 Restatement of Torts §582, Comment h

[28] Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Columbia L.Rev. 463, 465 (1909).

policy require the public defender to be absolutely immune from false statements, without regard to his purpose or motive, or the reasonableness of his conduct.

Contrary to any argument that only prosecutors and judges have been accorded absolute immunity, similar immunity has been accorded to virtually all participants who fulfill an important governmental function in our judicial process. The courts have held, for example, that grand jurors,[29] court clerks,[30] court reporters,[31] probation officers,[32] and bar association members participating in

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[29] Butz v. Economou, 438 U.S. 478, at 509-11 (1978); Turpen v. Booth, 56 Cal. 65 (1880).

[30] Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969); Pritt v. Johnson, 264 F.Supp. 167 (N.D. Pa. 1967).

[31] Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969); Morrow v. Igleburger, 67 F.R.D. 625, 689 (S.D. Ohio 1974).

[32] Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970); Friedman v. Younger, 282 F.Supp. 710, 715-16 (C.D. Cal. 1968).

disciplinary proceedings[33] are immune from liability. As the Ninth Circuit Court of Appeals has explained, the "key to the immunity" is that the allegedly improper conduct occurred "in the performance of an integral part of the judicial process". Robichaud v. Ronan, 351 F.2d 533, 536 (9th Cir. 1965). And Mr. Justice Stevens himself has observed, it is this very "performance . . . of public services which play such a significant role in our administration of justice" which justifies the doctrine of immunity for court-appointed defense attorneys. Walker v. Kruse, 484 F.2d 802, 805 (7th Cir. 1973) (opinion of Stevens, J.).

The absolute immunity of a public defender rests upon the most obvious grounds of public policy; it is designed to secure their complete independence and thus ad-

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[33] Kissell v. Breskow, 579 F.2d 425, 428-30 (7th Cir. 1978).

vance the pursuit of justice. The immunity looks, therefore, to the free and unfettered administration of justice, though as an incidental result it may in some instances afford protection to the malignant defamer. It is certainly not directed against persons injured by specific actions or defamation but is intended to protect various actions in judicial proceedings, including the filing of pleadings, the questioning of witnesses, and the conduct of the trial. The freedom of the participants in litigation from the fear of civil liability is deemed to advance the pursuit of justice and to outweigh private claims for redress.

Yet, if the very same acts, that is, the filing of pleadings, questioning of witnesses, and conduct of trial, are held to expose counsel to liability under 42 U.S.C. §1983, although not to liability for defamation, the purpose of the age-old immunity for defamation would be substan-

tially undercut. The defamation immunity would no longer achieve its purpose of protecting certain acts; it would merely have the random and meaningless function of defeating liability of a certain nature. Any competent drafter of pleadings could easily avoid its effect when bringing an action against a public defender.

As a result, if Mr. Dodson prevails in this matter, no public defender could fearlessly question a witness at trial without fear of civil liability, regardless of the historic defamation immunity. Consequently, unless the public defender is accorded absolute immunity under §1983 for actions taken in the course of representing a defendant, this court will have effectively abrogated the substance of the common law defamation immunity. In addition, to subject the public defender to such actions would be to restrain him in the full pursuit of the duty which he owes to his client, and which the success-

ful administration of justice demands. Thus, the public interest and legal tradition support a rule of absolute immunity under 42 U.S.C. §1983 for public defenders in the conduct of their official duties in the presentation or defense of a criminal case.

B. THE PUBLIC POLICY INTERESTS UNDERLYING THE IMMUNITY DOCTRINE AND THE CRIMINAL JUSTICE SYSTEM SUPPORT A GRANT OF ABSOLUTE IMMUNITY TO PUBLIC DEFENDERS FROM ACTIONS UNDER 42 U.S.C. §1983.

1. THE INTEREST IN ENCOURAGING PUBLIC DEFENDERS TO FEARLESSLY DISCHARGE THEIR DUTIES TO INDIGENT CLIENTS SUPPORTS A RULE OF ABSOLUTE IMMUNITY.

As this Court has recognized in the past, immunity is not granted for the benefit of those officials who are actually at fault in their actions. Instead, it is directed solely "for the benefit of the public whose interest it is that the [officials] should be at liberty to exercise their functions with independence and without fear of consequences."[34] In

[34] Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1968); quoted in Pierson v. Ray, 386 U.S. 547, 554 (1967).

light of the increased concern that government-paid defense counsel especially may face a sizable number of lawsuits from unhappy clients, it is important to understand that the principle of absolute immunity actually is in the best interests of the indigent criminal defendant. Indeed, a close analysis of the subject leads to the conclusion that the threat of liability under 42 U.S.C. §1983 would not render more effective legal service by public defenders, but would impair defense counsels' ability to fulfill his responsibilities both to the client and to the administration of justice.

The role of the public defender, perhaps more than that of the judge or prosecutor, requires freedom of action. The defender must be unfettered in his vigorous and fearless defense of the accused. Often the courtroom climate is hostile to his efforts when he represents an unpopular client. As he exerts every

effort to provide effective representation, he should not be called upon to measure his every word in relation to the personal consequences of a damages suit by his client. As Justice Learned Hand stated:

> "[I]t is impossible to know whether the claim is well founded until the case has been tried, and . . . to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties . . . There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation . . ."

> Gregoire v. Biddle, 177 F.2d 579, 581 (2nd Cir. 1949), quoted with approval in Barr v. Matteo, 360 U.S. 564, at 571 (1959).

Initially, the spector of liability would significantly affect the exercise of the public defender's independent judgment as to such matters in the conduct of litigation as the making of pre and post-trial motions, and the examination and cross examination of witnesses. It has been significantly recognized that effective representation of a defendant requires that the "power of decision" in such strategic and tactical areas "must rest with the lawyers".[35] To subject the public defender to liability under §1983 would significantly impair the ability of publicly financed defense attorneys "to

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35 American Bar Association, Standards Relating to the Prosecution Function and the Defense Function (approved draft, 1971), §5.2(b), at p. 240.

make strategic decisions with regard to a single litigant as to how best his interests may be advanced." Minns v. Paul, 542 F.2d 899, at 901 (4th Cir. 1976).

In addition, the threat of liability could divert the public defender's attention away from defending his client's interests in full. In order to prevail in such a §1983 action, the indigent defendant would have to show that he would have been acquitted except for the defender's poor representation, and possibly that he was actually innocent of the charges against him.[36] To allow such suits by disgruntled clients would be to place the public defender in the untenable position of seeking, at least subconsciously, evidence of their client's guilt so as to protect themselves from liability. As stated by the Third Circuit Court of Appeals, such fear of liability would pro-

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36 Martin v. Hall, 20 Cal. App. 3d 414, 97 Cal. Rptr. 730 (1971).

duce "a chilling effect upon defense counsel's tactics" and would catch him "in an intrinsic conflict of protecting himself and representing his client". Brown v. Joseph, 463 F.2d 1046, at 1049 (3rd Cir. 1972).

Perhaps most importantly, absolute immunity helps preserve the independence of professional judgment necessary to ensure that public defenders are able to meet the ethical standards important to the administration of justice. The ethical codes of the legal profession impose obligations on defense attorneys which sometimes conflict with thier client's wishes, such as the duty to disclose adverse legal precedents, to refrain from presenting frivolous claims or arguments, and to abstain from putting irrelevant matters before the jury. In thus assisting public defenders in meeting their professional responsibility to make efficient use of the limited resources of

the criminal defense system, absolute immunity would "encourage counsel in the full exercise of professionalism," including the "discretion, in the light of their training and experience, to decline to press the frivolous . . ." Miller v. Barilla, 549 F.2d 648, 649 (9th Cir. 1977).

Obviously, then, the principle of absolute immunity for public defenders sued under 42 U.S.C. §1983 is supported by exactly the same factors that justified immunity for prosecutors and judges: "concern that harassment by unfounded litigation would cause a deflection of . . . energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Imbler v. Pachtman, 424 U.S. 409, at 423 (1976). Absolute immunity is necessary to allow public defenders to be totally free to exercise their independent judgment in represent-

ing their clients without weighing every decision in terms of potential liability. Public policy prefers that a public defender's decisions be uninfluenced by outside considerations, even at the expense of an individual's priceless reputation. To withhold such a form of immunity would be to inhibit that professional discretion, and would create conflicts between the defender's desire to protect himself and his mandate to represent his client.

2. THE PUBLIC INTEREST IN ENCOURAGING ABLE LAWYERS TO ASSUME PUBLIC DEFENDER ROLES SUPPORTS THE PRINCIPLE OF ABSOLUTE IMMUNITY UNDER SECTION 1983 FOR SUCH DEFENDERS.

Another concern if public defenders are held to be liable to actions under 42 U.S.C. §1983 is ensuring that competent counsel remain willing to serve indigent defendants notwithstanding poor remuneration and civil liability. The federal courts have reasoned that absolute

immunity is necessary to encourage able individuals to become public defenders and that such recruitment would be difficult if defenders were subject to potential §1983 liability by unhappy clients.[37] Additionally, they fear that such a reluctance on the part of attorneys to serve as public defenders will have the very serious effect of jeopardizing the indigent defendants' Sixth Amendment right to effective assistance of counsel.[38] The Third Circuit has so ruled, saying:

> "There are other considerations of public policy. First, there is the desirability of encouraging able men and women to assume public defender roles. To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording the minutes, the presiding judge, and counsel of a co-defendant, privately retained or court-appointed, would be to discourage recruit-

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[37] Minns v. Paul, 542 F.2d 899, at 901 (4th Cir. 1976).

[38] John v. Hurt, 489 F.2d 786, at 788 (7th Cir. 1973).

> ment of sensitive and thoughtful members of the bar."
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> Brown v. Joseph, 463 F.2d 1046, at 1049 (3rd Cir. 1972).

Indeed, this problem of recruitment will be nearly impossible to solve without absolute immunity since the sheer number of §1983 suits likely to be filed against public defenders will certainly deter attorneys from accepting positions with defender offices. Such factors contributing to the potential increase in such actions are that the large caseloads of public defenders do not allow them to have the time to develop personal relationships with each defendant they are appointed to represent, and that indigents are more likely to bring frivolous suits than those retaining counsel.[39] Not surprisingly therefore, the American Bar Association has reported that "this area of practice has steadily lost popularity"

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[39] Robinson v. Bergstrom, 579 F.2d 401, at 410 (7th Cir. 1978).

despite "the demand for more lawyers as defense attorneys in an ever-increasing number of criminal cases."[40]

In addition, one commentor recently noted the numerous pressures to compromise felt by attorneys for indigent defendants: pressure from clients, superiors, opposing counsel, and agency personnel, "many of whom could not do their jobs or make a living unless large numbers of cases were smoothly processed and resolved"; and from judges and other deciders "who clearly recognize that they don't have the resources, time or energy to hear every case on its merits."[41] Recruitment of public defenders would greatly suffer if, in addition to these pressures, defenders faced the prospect of

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[40] American Bar Association, Standards Relating to the Prosecution Function and the Defense Function (approved draft 1971), at 151-2.

[41] Bellow, Turning Solutions Into Problems: The Legal Aid Experience, 34 NLADA Briefcase 106, 117 (1977).

being the one person in the system to be held liable in a §1983 action for results that may be attributable to the system itself. Without absolute immunity, such damage actions, often accruing years after a trial, would discourage many of the most qualified persons from becoming public defenders and could potentially be fatal to the attraction of defense counsel for indigent defendants.

3. THE PUBLIC INTEREST COMPELS A GRANT OF ABSOLUTE IMMUNITY SO THAT THE INTERESTS OF PUBLIC DEFENDERS ARE NOT DIVERTED FROM THEIR IMPORTANT PUBLIC FUNCTION OF REPRESENTING INDIGENT DEFENDANTS.

The threat of liability under 42 U.S.C. §1983 to public defenders could also work against the public interest since it would most certainly divert the attention of defenders from their primary function of representing criminal defendants. As experience has shown, the resentment of unsuccessful litigants may easily blossom into §1983 litigation, and defense of even frivolous §1983 suits

would consume the energy of state-subsidized attorneys which should be devoted to representing the interests of other indigent clients. Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976). The Civil Rights Act, which was designed as a shield against the misuse of state power, has itself been subject to great abuse. One federal court has noted that many prisoners do not view a civil action under 42 U.S.C. §1983 as providing ". . . for the redress for genuine grievances or wrongs, but as a blackjack to be used indiscriminately, maliciously, and at will to harass and annoy not only their jailers, but judges, jurors, witnesses and everyone having to do with their conviction." Roberts v. Barbosa, 227 F.Supp. 20, 21 (S.D. Cal. 1964).

Certainly, then, anything less than a grant of absolute immunity would force defense of suits well through the pleading stages, and would place a substantial

drain on an already burdened legal services resource. Miller v. Barilla, 549 F.2d 648, 650 (9th Cir. 1977). Very simply, the necessity to defend §1983 actions alleging malice or wrongdoing would result in a waste of the public defender's time, and would sidetrack his efforts from the public interest in defending indigent clients to the lesser interest in remedying private civil wrongs.

Mr. Justice Stevens' reasoning in a state malpractice action brought against a court-appointed attorney is applicable to the matter at hand. In that case, Justice Stevens stated:

> "Requiring such lawyers to defend charges such as this can only make it more difficult for the Bar to discharge its professional responsibilities which have been so greatly enlarged by the Supreme Court's holding in Argensinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530."
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> Walker v. Kruse, 484 F.2d 802, 804 (7th Cir. 1973) (Opinion

of Stevens, J.).

Significantly, it must be recognized that demands by indigent defendants on public defender offices have increased dramatically. Because of the heavy demand upon legal resources for defense of the indigent, public defenders are often forced to bear case loads which exceed recommended guidelines by 50% or more.[42] In some major American cities, public defenders have annual felony case loads of more than 500 per attorney.[43] In addition, complaints by disgruntled criminal defendants are often filed pro se or in forma pauperis, and are accordingly entitled to liberal treatment by the courts. Haines v. Kerner, 404 U.S. 519, 520 (1972). While such treatment is generally appropriate and should be encouraged, the result for public defenders

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[42] Bazelon, The Defective Assistance of Counsel, 42 U. Cinncinnatti Law Rev. 1, at 6 (1973).

[43] Note, Work Overload and Defender Burnout, 35 NLADA Briefcase 5, 7 (1977).

is that more of these types of actions are likely to get beyond the pleading stage and into lengthy and costly discovery proceedings, thus creating substantial hardships for even the most diligent and sincere defenders.

It should also be noted that other classes of officials have been granted absolute immunity from liability because it was recognized that they would be able to better perform their duties if they devoted more time to government service, rather than to the defense of tort suits. Specifically, in Barr v. Matteo, 360 U.S. 564 (1959), the Supreme Court granted certain federal officials immunity so that the defense of malpractice suits would not "consume time and energies which would otherwise be devoted to governmental service." Id. at 571. Such reasoning is equally applicable to the case at hand.

It is inescapable, then, that since public defender offices are already greatly

understaffed and overburdened, their representation of indigent clients would improve if the defense of §1983 suits is not added to their case load. As this court recently held, such claims "could impose unique and intolerable burdens" upon advocates "responsible annually for hundreds" of cases. Imbler v. Pachtman, 424 U.S. 409, at 425-26 (1976). Lord Fry's statement almost 100 years ago concerning absolute immunity remains true today:

> "It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgment against them, but to the vexation of defending actions."
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> Muenster v. Lamb, 11 Q.B.D. 588, 607 C.A. (1883), quoted approvingly by Lord Reid in Rondel v. Worsley, 1 A.C. 191, at 229 (1969).

4. THE PUBLIC INTEREST SUPPORTS A GRANT OF ABSOLUTE IMMUNITY TO PUBLIC DEFENDERS, SINCE THE FEAR OF §1983

LIABILITY MIGHT DISSUADE DEFENDERS FROM REVEALING WEAKNESSES IN THE CASE OR CONFESSING ERROR FOR A NEW TRIAL.

Perhaps the most direct conflict of interest between the public defender and client which the threat of §1983 liability would create involves the defender's obligation to acknowledge and argue his or her own errors in striving to obtain a new trial or post-conviction relief for the indigent. Very obviously, there would be a conflict between the public defender's duty to fully represent his client's interest by revealing flaws in his case and his interest in protecting himself from civil liability. The fear of §1983 liability could easily discourage defenders from revealing candidly to the courts or clemency boards weaknesses in the defense case or later discovered evidence, thus injuring the pursuit of justice. Furthermore, the background element of a potential civil damage action

might warp the habeas corpus and appellate proceedings by making judges less willing to find misconduct on the part of the defender, and by making counsel more unbending and less apt to confess error.

Thus, the irony of a potential §1983 action against a public defender is that it inhibits the attorney-client relationship and compels the defender to argue the lack of merit in the cause he is supposed to advocate. Indeed, an attorney concerned over his own potential §1983 liability might be induced to present arguments that are actually prejudicial to the defendant. Certainly, there would be a dampening effect on a public defender's acknowledgment of his own mistake in the presentation of the case. Each and every public defender would be rightly concerned that in effectively representing his client, he does not also dictate the complaint for a subsequent §1983 action.

In short, a public defender should be able to admit a mistake without subjecting himself to litigation under the Civil Rights Act. If absolute immunity is not granted the defender, tension might develop between the attorney's duty to zealously represent his client and his instinct of self-protection; as a result, the defender could become reluctant to seek a new trial or habeas corpus, and the quality of legal representation for indigent defendants might suffer accordingly. Certainly, the public defender's obligation to his profession and justice outweigh a private claimant's right to civil compensation. Therefore, §1983 liability should not be created which might cause conflict with the public defender's overriding duties to his client and to justice.[44]

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[44]Compare: "For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequence to himself." Bradley v. Fisher, 80 U.S. (913 Wall) 335, at 347, 20 L.Ed. 646, at 649 (1872).

5. THE PUBLIC INTEREST SUPPORTS A RULE OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS UNDER §1983, SINCE ANYTHING LESS WOULD INVOLVE A FORM OF COLLATERAL ATTACK ON A CRIMINAL JUDGMENT AND WOULD CREATE UNCERTAINTIES AND COMPLICATIONS IN THE CRIMINAL JUSTICE SYSTEM.

Yet another consideration of public policy which supports absolute immunity for public defenders is that interest relating to the prevention of collateral attacks on judicial proceedings by virtue of §1983 damage actions. In such an action, the testimony of the trial judge and the jurors as to the impact of the defender's actions would often be relevant, but would certainly create an uncertainty and confusion in the judicial system. The presentation of a wide variety of complex issues in such a lawsuit often would require a virtual retrial of the original criminal offense in a new forum, and the resolution of some technical issues by the lay jury. Imbler v. Pachtman, 424 U.S. 409, 423 (1976). In addition, proving

damages against the public defender would require a good deal of speculation by the jury as to the effect the defender's negligence had on the conviction, which effort would be made all the more confusing since such a civil matter would be tried with different standards of proof and rules of procedure than that of the original criminal trial. All things considered, such a scenario simply begs for inconsistent results.

The basic interest was well put by Lord Morris of Borth-Y-Gest in Rondel v. Worsley as follows:

> "A system which is devised so as to provide adequate and reasonable safeguards against the conviction of innocent persons and to provide for appeals must nevertheless aim at some measure of finality. If the system is found not to be adequate then it can be altered and modified; it can be kept continually under review. I cannot think, however, that it would be in the public interest to permit a sort of unseemly excrescence upon our legal system whereby someone who has been convicted

> and has, without success, exhausted all the procedures for appeal open to him should seek to establish his innocence (and to get damages) by asserting that he would not have been convicted at all but for the fact that his advocate failed to exercise due care and skill."
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> Rondel v. Worsley, 1 A.C. 191, at 250 (1969).

6. THE DOCTRINE OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS PROMOTES LEGITIMATE AND SUBSTANTIAL GOVERNMENTAL INTERESTS.

One governmental consideration that appears to have inclined some judges to find absolute immunity for public defenders is the fear that federal courts would be flooded with §1983 suits that are without merit.[45] The dissatisfied former client almost always brings these suits pro se, and from prison. As one court noted, "the experience of the federal courts in federal habeas corpus and §1983 litigation

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[45] Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976);

Brown v. Joseph, 463 F.2d 1046, 1049 (3rd Cir. 1972).

demonstrates that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties." Minns v. Paul, 542 F.2d 899, 902 (4th Cir. 1976).

In addition to awareness of the practical limitations of defender-provided counsel and of the burgeoning number of §1983 prisoner complaints against such counsel, federal courts have evidenced concern about federalism. In general, federal courts are reluctant to sit in review of the conduct of state courts, as they must do in §1983 actions against public defenders. In Morgan v. Sylvester, 125 F.Supp. 380 (S.D. N.Y. 1954), affirmed 220 F.2d 758 (2nd Cir.), the problem was stated emphatically:

> "This action is a clear attempt, despite plaintiff's assertion to the contrary, to obtain a review and a retrial of the state court proceedings. The fact that a defeated litigant is prepared to charge a 'conspiracy' recklessly or otherwise and recite in haec

> verba the language of the Civil Rights Act does not give a right of review in the federal courts. To uphold the claim here advanced upon such conclusory allegations would open the door to every aggrieved litigant in a state court proceeding, and set the federal courts up as an arbiter of the correctness of every state decision. This case demonstrates forcibly the wisdom of the public policy which grants immunity to judicial and other officials for acts performed in the discharge of their duties."
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> Morgan v. Sylvester, supra, at 387.

The Morgan court thus viewed the immunity of judicial officers as an appropriate way to block both an improper state-federal court relationship and an increase in federal case load.

C. THE AVAILABILITY OF ALTERNATIVE SANCTIONS AND RESTRAINTS SUPPORTS A FINDING OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS UNDER 42 U.S.C. §1983.

It must be emphasized that a grant of absolute immunity for public defenders for actions under 42 U.S.C. §1983 does not leave the public powerless to deter mis-

conduct or to punish that which occurs. Judicial sanctions and professional disciplinary proceedings are readily available against an incompetent attorney, and these remedies can be more objectively applied as they would be imposed by those better informed of the strains of the profession and the intricacies of presenting a criminal defense. The use of such alternatives would leave less room for purely vindictive suits and would result in a more fair evaluation of the merits of the claim. These checks undermine the argument that the imposition of §1983 liability is the only way to insure that public defenders are mindful of the constitutional rights of indigent defendants.

Firstly, all attorneys are bound to represent a client zealously within the bounds of the law. Canon 7, American Bar Association Code of Professional Responsibility. Failure to do so can result in strict disciplinary action being taken.

For years, the courts have imposed various types of discipline on negligent criminal defense counsel, including fines,[46] reprimands,[47] suspension,[48] and disbarment.[49] Such sanctions give assurance that public defenders will invariably faithfully carry out their professional responsibilities.

Another major factor which deters misconduct by public defenders exists under the federal criminal statutory counterpart of §1983, 18 U.S.C. §242.[50] Under this

[46] United States v. Smith, 436 F.2d 1130, 1133 (9th Cir. 1970).

[47] Florida Bar v. Dingle, 220 So.2d 9 (Fla. 1969).

[48] In Re Martin, 30 App. Div.2d 361, 292 N.Y.S.2d 328 (1968).

[49] In Re McDermit, 86 N.J. 17, 114 A. 144 (1921).

[50] 18 U.S.C. §242:

"Whomever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if death results shall be subject to imprisonment for any term of years or for life."

statute, a public defender may be criminally charged for willful conduct which results in the deprivation of a constitutionally protected right, such as the right to effective assistance of counsel. Robinson v. Bergstrom, 579 F.2d 401, 410 (7th Cir. 1978). Even judges, who have been cloaked with absolute immunity for centuries, can be punished criminally for willful deprivation of constitutional rights on the strength of 18 U.S.C. §242. O'shea v. Littleton, 414 U.S. 488, 503 (1974).

In addition, the indigent defendant would arguably have the same state action in tort for malpractice against the public defender as a former client might have against a privately retained attorney. Robinson v. Bergstrom, 579 F.2d 401, 410 (7th Cir. 1978).

As seen, absolute immunity from §1983 actions for the public defender does not mean that he will be allowed to operate

outside of the law and free of its rules. Since he is subject to more restraints, review, and sanctions, including criminal penalties, for wrongful conduct than a private individual, the deterrent of a §1983 damage suit is not necessary to enforce proper behavior.

D. THE SAME FUNDAMENTAL PREMISE WHICH UNDERLIES THE POLICIES SUPPORTING ABSOLUTE IMMUNITY FOR JUDGES, PROSECUTORS, AND OTHER OFFICIALS ALSO SUPPORTS A GRANT OF ABSOLUTE IMMUNITY FOR PUBLIC DEFENDERS.

The identical policy considerations which result in absolute immunity for judges and prosecutors (i.e. the concern that harassment from unfounded litigation will divert an attorney from his public duties and the exercise of his best judgment) are equally applicable to public defenders. Undoubtedly, the very function of the government-sponsored participants in the judicial process often invites a common law tort action. Since judges, prosecutors, and public defenders all

exercise a good deal of discretion for justice's sake during the course of a criminal proceeding, the complete independence of their judgment serves public policy and justifies a grant of absolute immunity. As recently stated:

> "The reasoning which provides immunity for various public officials . . . is also applicable to the performance by private citizens of public services which play a significant role in the administration of justice."
>
> Walker v. Kruse, 484 F.2d 802, 804-5 (7th Cir. 1973).

The American Bar Association Standards §1.1(a) advance the theory that the judge, the prosecutor, and the defense counsel are a tripartite entity operating for the efficient administration of justice.[51] Lower courts have concluded that this tripartite entity exists for the public interest, and each part of the

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[51] American Bar Association, Standards Relating to the Prosecution Function and the Defense Function (approved draft, 1971), §1.1(a), at p. 44.

triangle must have equal immunity to function effectively. As stated above, it is argued that identically the same policy considerations for according immunity to the judge and prosecuting attorney exist in favor of the public defender. Indeed, in Imbler v. Pachtman, 424 U.S. 409, 426 (1976), the Supreme Court pointed out:

> ". . . Attaining the system's goal of determining guilt or innocence requires that both the prosecutor and the defense have wide discretion in conduct of the trial and the presentation of evidence."

In finding a public defender absolutely immune from a §1983 suit, the Third Circuit Court of Appeals stated:

> "We perceive no valid reason to extend this immunity to state and federal prosecutors and judges and to withhold it from state-appointed and state-subsidized defenders. Implicit in this extension of judicial immunity to prosecutors was the recognition of a public policy encouraging free exercise of professional discretion in the discharge of pre-trial, trial, and post-trial obliga-

> tions. Indeed, the very reasons advanced to assert that the public defender acts under color of state law because of the favorable comparison of his activities with those of public prosecutors, would, a fortiori, support an argument in favor of the public defender on the immunity issue."
>
> Brown v. Joseph, 463 F.2d 1046, 1048-9 (3rd Cir. 1972).

Together in the same courtroom, the judge, the prosecutor, and the public defender perform separate but common functions in a joint effort to achieve substantial justice. The acts of the public defender in representing indigent defendants are, like those of the prosecutor in prosecuting the accused and those of the judge in administering justice, an integral part of the judicial process and are entitled to absolute immunity from §1983 liability.

E. AVAILABLE ALTERNATIVES TO §1983 LIABILITY FOR PUBLIC DEFENDERS PROVIDE SUPERIOR METHODS FOR ENSURING AN INDIGENT DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In addition to the historical and policy arguments outlined above, the basic question arises as to the overall necessity for allowing a §1983 damages action as a remedy for an indigent defendant. Indeed, the individual who is convicted as the result of the failure of his public defender to provide the minimum level of counsel has a number of alternative remedies which are far more effective at vindicating the right to effective assistance of counsel than civil liability would be. The procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these, the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under the law. Imbler v. Pachtman, 424 U.S. 409, at 427 (1976). The availability of such alternatives ensure that the criminal defendant is not left without an adequate legal remedy

with which to assert his rights.

The basic alternatives to a §1983 action were summarized by the Fourth Circuit as follows:

> "Finally, we note that the rule of absolute immunity which we adopt does not leave the typical indigent entirely remediless. If the misconduct of assigned counsel results in a deprivation of a federal right in the defense of a prosecution, redress of the deprivation may be achieved in a direct appeal, a state post-conviction remedy, or by federal habeas corpus . . . if the misconduct of the state-appointed attorney causes the inmate to be unsuccessful in a state habeas corpus proceeding, then federal rights may still be vindicated through federal habeas corpus. Further, if the inmate fears that the state-appointed attorney is incompetent or bears malice, then the inmate may proceed pro se."
>
> Minns v. Paul, 542 F.2d 899, at 902 (4th Cir. 1976).

Furthermore, the indigent may raise the issue of ineffective assistance of counsel in a motion for new trial, where he may have a different lawyer appointed

to represent him.[52] And, as a final alternative, the defendant would arguably have the same state action in tort for malpractice against the public defender as a former client might have against a retained attorney.[53]

It is entirely wrong to assume that the above-mentioned forms of post-conviction relief are inadequate because they do not provide money damages and because they do not directly punish the public defender himself. Reversal of an accused's conviction is the ultimate remedy provided by our judicial system to redress the constitutional right to a fair trial, and this Court's decisions regarding immunity have never suggested that such means are inade-

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[52] Robinson v. Bergstrom, 579 F.2d 401, at 410 (7th Cir. 1978).

[53] Robinson v. Bergstrom, supra, at 411. The Robinson court also disposed of the argument that immunity discriminates in favor of those defendants who are not able to afford retained counsel in a criminal case by noting that a private attorney would not be liable to a §1983 claim. 479 F.2d at 411.

quate merely because the officer who may have been responsible is not punished and a monetary sum is not allowed the defendant. See Imbler v. Pachtman, 424 U.S. 409, at 427 (1976). In fact, post-conviction remedies would appear to be much more effective than §1983 liability, since the former vindicate an indigent's constitutional rights by allowing him a new trial and possible freedom, while the latter involves only monetary damages which do not redress the basic deprivation of liberty that even the successful §1983 claimant would continue to suffer.

Finally, as this Court has previously stated, a rule of §1983 liability for public defenders often "would prejudice defendants in criminal cases by skewing post-conviction judicial decisions that should be made with the sole purpose of insuring justice." Imbler v. Pachtman, 424 U.S. 409, at 428 (1976). As the Court in Imbler noted, such post-conviction

proceedings are "focused primarily on whether there was a fair trial under law." Imbler, supra, at 427. "This focus," the court explained, "should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused" could result in the public defender "being called upon to respond in damages" for an alleged "error or mistaken judgment." Imbler, supra, at 427.

As seen, §1983 liability for public defenders would not only fail to provide a superior remedy to post-conviction proceedings, but it would also rob the traditional form of relief of much of its fairness and effectiveness. Therefore, this Court should uphold the ruling of the federal appellate courts that the availability of post-trial relief provides indigent defendants with an adequate remedy. Brown v. Joseph, 463 F.2d 1046, at 1049 (3rd Cir. 1972).

CONCLUSION

For these reasons, the decision of the Eighth Circuit Court of Appeals should be reversed; public defenders should be found not to act under color of state law for the purposes of 42 U.S.C. §1983, and should be granted absolute immunity from actions brought under that act.

Respectfully submitted,

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APPENDIX

APPENDIX A

The Iowa Public Defender Act, Chapter 336A, in pertinent part provides:

§336A.1 Office established or abolished. In any county, the board of supervisors may establish or abolish, by resolution of the board, the office of public defender. A county may join with one or more other contiguous counties within its judicial district to establish one office of public defender to serve those counties.

If more than one county is involved in the abolishment of the office of public defender, the office shall not be abolished unless the abolishment is authorized by resolution of the board of supervisors of each of the counties involved.

§336A.2 Contributions to funds. In addition to such funds as may be appropriated from the court fund by the county for this purpose, a county may accept money and other contributions from private

organizations and individuals, and other public agencies, in order to finance the establishment or operation of the office of public defender and be strictly accountable therefor.

§336A.3 Nomination and appointment.

1. The public defender shall be a qualified attorney admitted to practice before the Iowa Supreme Court. When a vacancy exists in the office of the public defender, the district court judges of the judicial district containing the county or counties which the defender is to serve, sitting en banc, shall nominate two attorneys qualified to serve as public defender and certify the names of such nominees to the board of supervisors of the county or counties which the public defender is to serve. The supervisors shall, within thirty days after such certification, appoint by majority vote, one of these nominees to be public defender for a term of six years so long as he

shall remain qualified as otherwise provided in this chapter.

2. The public defender shall represent without charge, each indigent person who is under arrest or charged with a crime if:

a. The defendant requests it; or

b. The court, on its own motion or otherwise so orders.

§336A.4 Indigent defined. For the purpose of this chapter, an indigent shall be any person who would be unable to retain in his behalf, legal counsel without prejudicing his financial ability to provide economic necessities for himself or his family.

Before the initial arraignment or other initial court appearance, the determination of indigency shall be made by the public defender within criteria set by the board of supervisors. At or after arraignment or other initial court appearance, the determination shall be

made by the court.

§336A.5 Compensation.

1. The compensation of the public defender shall be fixed by the board of supervisors.

2. The public defender may appoint as many assistant attorneys, clerks, investigators, stenographers, and other employees as the board considers necessary to enable him to carry out his responsibilities. Appointments under this section shall be made in the manner prescribed by the county board of supervisors. An assistant attorney must be a qualified attorney licensed to practice before the supreme court.

3. The compensation of persons appointed under subsection 2 shall be fixed by the county board of supervisors.

§336A.6 Duty of defender. When representing an indigent person in a criminal proceeding, the public defender shall counsel and defend him, whether he is held in

custody without commitment or charged with a criminal offense, at every stage of the proceedings against him; and prosecute any appeals or other remedies before or after conviction that he considers to be in the interest of justice.

§336A.7 Other attorney appointed. The court may, for cause, upon the application of the indigent person or the public defender, or on its own motion, appoint an attorney other than the public defender, to represent the indigent person at any state of the proceedings or on appeal. The attorney so appointed shall be compensated as provided in section 815.7.

§336A.8 Report to court. The public defender shall make an annual report to the judges of the district court sitting in any county he serves, the attorney general and the board of supervisors of any county he serves reporting all cases handled by him during the preceeding year.

§336A.9 Office. The county board of supervisors shall provide office space, furniture, equipment, and supplies for the use of the public defender suitable for the business of his office. However, an allowance may be provided in place of facilities. Each item is a charge against the county in which the services were rendered. If the public defender serves more than one county, expenses that are properly allocable to the business of more than one of those counties shall be prorated among the counties concerned.

§336A.10 Time devoted to office. The board of supervisors of a county may require a public defender or assistant public defender to devote his or her full time to the discharge of his or her duties and not to directly or indirectly engage in the private practice of law except that he or she may be a member of a law partnership or a professional corporation on leave of absence.

§336A.11 Prohibited conduct. No public defender or assistant public defender shall directly or indirectly refer any legal matter or civil or criminal litigation to any particular lawyer or lawyers or directly or indirectly recommend or suggest to any person the employment of any particular lawyer or lawyers to counsel in, conduct, defend, or prosecute any legal matter or litigation, if the county is or is likely to be a party thereto or have a substantial interest therein; or receive any direct or indirect fee or compensation for or in connection with any such referral, recommendation, or suggestion. However, he or she may recommend a lawyer when requested to do so by any court, governmental agency, or legal aid society.

CERTIFICATE OF FILING

I, Thomas M. Werner, hereby certify that I filed my Brief for the Petitioners by depositing forty copies thereof in the United States mail on May 5, 1981, addressed to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543. I further certify that I will file the revised edition of the Brief for the Petitioners on or before June 1, 1981.

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CERTIFICATE OF SERVICE

I, Thomas M. Werner, hereby certify that on the 5th day of May, 1981, three copies of the Brief for the Petitioners were mailed, postage prepaid, to John D. Hudson, 510 Fleming Building, Des Moines,

Iowa, Counsel for the Respondent. The revised edition of the Brief for the Petitioners was served on the Counsel for the Respondent on or before June 1, 1981. I further certify that all parties required to be served have been served.

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